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No. 00-484

In the Supreme Court of the United States

FREDERICK LAMAR HARRIS, ET AL., PETITIONERS

v.

WAYNE GARNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the exhaustion provision of the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(a) (Supp. IV 1998), required petitioners to exhaust their administrative remedies before filing suit.

2. Whether the PLRA's exhaustion requirement violates the Due Process Clause of the Fourteenth Amendment when the state grievance system requires a prisoner to file a grievance within five days of the date on which the grievance arises, but allows exceptions for good cause.

3. Whether a suit alleging excessive force by prison officials is an action brought by a prisoner "with respect to prison conditions" within the meaning of the PLRA's exhaustion requirement.

4. Whether the PLRA's requirement that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury, 42 U.S.C. 1997e(e) (Supp. 1998), applies to constitutional claims, and if so, whether such a bar is constitutional.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-77) is reported at 216 F.3d 970. The panel opinion (Pet. App. 78-96) is reported at 190 F.3d 1279. The order of the district court (Pet. App. 97-99) and the order and recommendation of the magistrate judge (Pet. App. 101-107) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2000. A petition for a writ of certiorari was filed on September 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are current and former inmates at the Dooley Facility of the Georgia State Department of Corrections. Pet. App. 79-81. They filed suit in federal district court against state prison officials (respondents), alleging that respondents violated their rights under the Fourth, Eighth, and Fourteenth Amendments to the Constitution during a prison "shakedown." *Id.* at 79-80. In particular, petitioners alleged that prison officials performed body cavity searches when members of the opposite sex were present, physically harassed some inmates, ordered one inmate to "dry shave" with an unlubricated razor, verbally harassed one inmate concerning his perceived sexual orientation, and ordered one inmate to "tap dance" while naked. *Id.* at 80.

Respondents moved to dismiss based on the "exhaustion" and "physical injury" provisions of the Prison Litigation Reform Act of 1995 (PLRA). Pet. App. 81-82. The exhaustion provision specifies that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a) (Supp. IV 1998). The physical injury provision specifies that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. 1997e(e) (Supp. IV 1998).

Adopting in large part a magistrate judge's order and recommendation (Pet. App. 101-107), the district court granted the motion to dismiss (*id.* at 97-99). The dis-

trict court dismissed the claims of petitioners who had not exhausted their administrative remedies on the basis of the exhaustion requirement. The court rejected petitioners' contentions that their claims did not concern "prison conditions," that exhaustion by some should excuse exhaustion by others, and that claims for monetary relief need not be exhausted. *Id.* at 103-105.

Relying on the physical injury provision, the court dismissed the monetary claims of those petitioners who alleged only mental or emotional injury. Pet. App. 98-99, 105-106. The court held that the physical injury provision applies to the claims of prisoners who have been released after suit is filed. *Id.* at 106 n.9. The court also ruled that the physical injury provision is constitutional. *Id.* at 106. Finally, the court ruled that a "dry shave" does not constitute the kind of physical injury that would support a claim for mental or emotional injury. *Id.* at 99.

2. A panel of the court of appeals affirmed in part and vacated in part. Pet. App. 78-96.[1] The panel first held that the physical injury provision does not apply to persons who are released from prison before the entry of a district court's judgment. *Id.* at 83-85. The panel therefore vacated the portion of the district court's judgment dismissing the monetary claims of the petitioners who were released from prison before entry of the district court's judgment. *Ibid.*

The panel next held that the exhaustion requirement barred the claims of the petitioners who had not exhausted administrative remedies. Pet. App. 85-87. The

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[1] The United States intervened on appeal to defend the constitutionality of the PLRA's exhaustion and physical injury provisions. The United States also participated as amicus curiae on questions concerning the construction of the exhaustion provision.

court rejected petitioners' argument that exhaustion was not required because the prison had already rejected similar claims, and because the prison's administrative procedure does not provide monetary relief. *Ibid.* Relying on prior circuit precedent, the court held that, under Section 1997e(a), "a prisoner must exhaust all administrative remedies that are available before filing suit, regardless of their adequacy." *Id.* at 87.

Finally, the court of appeals affirmed the dismissal of the claim of the petitioner who alleged that he had been ordered to "dry shave" on the ground that his claim was barred by the physical injury provision. Pet. App. 87-95. The court ruled that the physical injury provision requires proof of something "more than a de minimis physical injury," and that petitioner's "dry shave" did not cross that threshold. *Id.* at 88-89. The court also rejected petitioner's argument that the physical injury provision is unconstitutional. *Id.* at 89-95. The court held that the physical injury provision does not bar claims for injunctive or declaratory relief and that the Constitution does not mandate a damages remedy for every constitutional violation. *Id.* at 91-92.

3. The court of appeals granted rehearing en banc, and the en banc court affirmed in part and vacated in part the district court's judgment. Pet. App. 1-29. The court held that the physical injury provision barred the claims of those petitioners who were released from prison after they filed suit. *Id.* at 3-27. Relying on the plain meaning of the term "bring," the court concluded that, as long as a person is incarcerated at the time he files suit, a claim for emotional or mental injury is barred unless there is a showing of physical injury. *Ibid.* The court concluded, however, that a dismissal under the physical injury provision should be without

prejudice, allowing a person to refile a complaint after he has been released from prison. *Id.* at 18-19.

The en banc court also rejected petitioners' contention that the physical injury provision does not apply to constitutional claims. Pet. App. 27-28. The court reasoned that the plain language of the provision applies to constitutional claims and that Congress's purpose of deterring frivolous lawsuits would be thwarted if the provision did not apply to constitutional claims. *Ibid.* In all other respects, the en banc court reinstated the panel's decision. *Id.* at 3.

Judge Anderson filed a special concurrence that largely agreed with the majority's reasoning concerning the application of the physical injury provision to suits filed by inmates who are released after suit is filed. Pet. App. 29-30. Judge Tjoflat (joined by Judges Birch, Barkett, and Wilson) concurred in part and dissented in part. Judge Tjoflat concluded that a district court has discretion to permit a person who was released from prison after he filed suit to avoid the bar of the physical injury provision by supplementing his complaint with the fact that he is no longer a prisoner. *Id.* at 30-77.

DISCUSSION

1. Petitioners argue (Pet. 7) that they should not have been required to exhaust administrative remedies pursuant to the exhaustion provision of the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a) (Supp. IV 1998), because their prison's administrative process could not have provided them with any relief. In particular, petitioners contend (Pet. 11-13) that, since they could not comply with the prison's deadline for filing complaints, and the prison had already refused to grant any relief in other cases involving the same

incident, exhaustion of administrative remedies would have been a meaningless formality. Petitioners note that there is a conflict in the circuits concerning whether the PLRA's exhaustion provision requires a prisoner to exhaust administrative remedies when the prisoner seeks relief that cannot be provided by the existing prison administrative procedure. Pet. 8-9 (citing cases). And they urge the Court to grant review in order to resolve that conflict.

On October 30, 2000, the Court granted certiorari in *Booth* v. *Churner* (No. 99-1964), to decide whether the PLRA's exhaustion provision "requires a prisoner seeking only monetary damages to exhaust administrative remedies where monetary damages are not available under the applicable administrative process." Pet. at i, *Booth* v. *Churner*, No. 99-1964. The resolution of the question in *Booth* is likely to shed light on the question raised by petitioners. The Court should therefore hold the present petition pending its decision in *Booth*, and then dispose of the petition as appropriate in light of that decision.

2. Petitioners also argue (Pet. 14-16) that the Court should grant review to decide whether the PLRA's exhaustion requirement violates the Due Process Clause of the Fourteenth Amendment when a State's grievance procedure requires a prisoner to file a grievance within five days of the date on which the grievance arises. Petitioners, however, did not raise that issue in the court of appeals, and the court of appeals did not address it. Petitioners' due process question is therefore not properly presented here. See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

Moreover, the question that petitioners seek to present—whether a procedure that allows only five

days for the filing of the complaint violates due process —is not presented by the state scheme at issue here. Under the Georgia procedure, "[t]he form must be filed within five (5) calendar days from the date the inmate discovered, or reasonably should have discovered, the incident giving rise to the complaint and was able to file the grievance." Georgia Dep't of Corr., *Standard Operating Procedures*, Reference No. IIB05-0001, para. V.D.6 (Jan. 1, 1996). The Grievance Coordinator, however, "may waive this time period in appropriate cases for good cause shown." *Ibid.* Because the state scheme at issue allows for the filing of complaints after the five-day period to which petitioners object, petitioners' due process question is not presented here.

3. Petitioners also seek review (Pet. 17-18) of the question whether a suit alleging excessive force by prison officials is an action "with respect to prison conditions" within the meaning of the PLRA's exhaustion provision and therefore subject to the exhaustion requirement. As petitioners note (Pet. 17-18), there is a conflict in the circuits on that issue. Compare *Booth* v. *Churner*, 206 F.3d 289, 293-294 (3d Cir. 2000) (excessive force claims are claims "with respect to prison conditions"), cert. granted, No. 99-1964 (Oct. 30, 2000), and *Freeman* v. *Francis*, 196 F.3d 641, 643-644 (6th Cir. 1999) (same), with *Nussle* v. *Willette*, 224 F.3d 95, 99-106 (2d Cir. 2000) (excessive force claims are not claims "with respect to prison conditions"), petition for cert. pending, No. 00-853. Review of that question in this case, however, is not warranted. Petitioners did not raise that issue in the court of appeals, and the court of

appeals did not address it. That question is therefore not properly presented here.[2]

4. Finally, petitioners seek review (Pet. 19-29) of the questions whether the PLRA's physical injury requirement applies to constitutional claims, and if so, whether that provision is constitutional. Those questions do not warrant review.

a. The physical injury provision specifies that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. 1997e(e) (Supp. IV 1998). That statutory text prevents a plaintiff from seeking damages for mental or emotional injury, absent a showing of physical injury, regardless of whether the mental or emotional injury arises from a constitutional violation or a violation of another legal norm. As the court of appeals succinctly explained (Pet. App. 27), "'no' means no." Moreover, as the court of appeals further emphasized (*id.* at 28), Congress added the physical injury provision in order to reduce the number of frivolous lawsuits filed by inmates and that purpose would be thwarted if the physical injury provision did not apply to constitutional claims. The court of appeals therefore correctly held that the physical injury provision bars an inmate from seeking damages for mental or emotional injury arising

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[2] Petitioners assert (Pet. 17 & n.10) that they raised the question in the court of appeals. But the passage cited by petitioners appears in a footnote in which they simply noted that some courts had held that Section 1997e(a) does not apply to excessive force claims. Appellants' Br. 20 n.9. Petitioners never urged the court of appeals to reverse the district court's judgment on that ground.

from a constitutional violation absent a showing of physical injury.

Petitioners contend (Pet. 22) that the court's interpretation of the physical injury provision conflicts with the Ninth Circuit's decision in *Canell* v. *Lightner*, 143 F.3d 1210 (9th Cir. 1998). There is, however, no conflict. In *Canell*, the Ninth Circuit interpreted the complaint in that case as seeking relief for a violation of First Amendment rights, independent of any mental or emotional injury. In those circumstances, the physical injury provision did not operate as a barrier to suit. *Id.* at 1213. In this case, by contrast, petitioners have expressly sought relief "for their pain, suffering, and other hardships" arising from respondents' alleged acts. Complaint at 17. Since petitioners failed to allege that they have suffered any physical injury, petitioners' claims are barred by the physical injury provision.

The Seventh Circuit decisions relied on by petitioners (Pet. 22) also do not conflict with the decision below. In *Robinson* v. *Page*, 170 F.3d 747, 748-749 (1999), the Seventh Circuit noted that the physical injury provision does not apply to damage claims for injuries that cannot be classified as mental, emotional, or physical. For example, a prisoner who claims damages for a taking of his property could recover for the economic harm of the taking without showing that he suffered a physical injury. *Ibid.* Similarly, in *Rowe* v. *Shake*, 196 F.3d 778, 781 (7th Cir. 1999), as in *Canell*, the court held that an action brought by a prisoner alleging that prison authorities had violated his First Amendment right to receive his mail was not barred by the physical injury provision. The court explained that the prisoner had not sought damages for emotional or mental injury arising from his failure to receive his mail. *Ibid.* Since petitioners have sought damages for

mental or emotional injury, the decisions in *Robinson* and *Rowe* are inapposite here.

There is also no conflict between the decision below and the Second Circuit's decision in *Liner* v. *Goord*, 196 F.3d 132, 135-136 (1999). In *Liner*, the Second Circuit held that the inmate in that case had adequately alleged physical injury and that the physical injury provision therefore did not operate as a barrier to his suit. *Id.* at 135. The court's additional ambiguous statement that the district court had failed to consider whether the inmate's allegations "might state a claim under the Eighth Amendment in addition to stating a claim for emotional distress" was unnecessary to the decision in that case. *Id.* at 135-136.[3]

b. Petitioners also err in contending (Pet. 24-25) that the physical injury provision is unconstitutional insofar as it applies to constitutional claims. This Court's decisions establish that the Constitution does not require an effective damage remedy for every constitutional violation. For example, in *Bush* v. *Lucas*, 462 U.S. 367, 372 nn.7, 8 (1983), the Court upheld a scheme that provides compensation to government employees

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[3] To the extent that *Canell*, *Rowe*, and *Liner* suggest that a plaintiff can recover compensatory damages under 42 U.S.C. 1983 (Supp. IV 1998) for a constitutional violation without some further showing of actual injury, that suggestion is incorrect. Compensatory damages under Section 1983 lie only for actual injury, not for "the abstract value of a constitutional right." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 308 (1986). See *Allah* v. *Al-Hafeez*, 226 F.3d 247, 250-251 (3d Cir. 2000) (applying the holding in *Stachura* to a claim brought by an inmate). In any event, since petitioners have sought damages for emotional and mental injury and not for the abstract value of their constitutional rights, the question whether prisoners can recover compensatory damages for the abstract value of their constitutional rights is not presented here.

for unconstitutional employment actions, even though the scheme does not provide for punitive damages, a jury trial, attorneys' fees, or damages for emotional and dignitary harms. Similarly, in *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988), the Court upheld a remedial scheme for violations of the constitutional rights of social security recipients, even though that scheme does not provide a damage remedy for emotional distress or for other hardships suffered because of delay in the receipt of social security benefits. In both cases, the Court held that Congress's chosen remedial scheme provides meaningful safeguards for the protection of constitutional rights, and that Congress had reasonably determined that the additional remedies desired by the plaintiff would impose undesirable costs. *Schweiker*, 487 U.S. at 425; *Bush*, 462 U.S. at 386, 388-389.

In addition, in *Chappell* v. *Wallace*, 462 U.S. 296, 304-305 (1983), the Court held that there is no implied damages remedy for a member of the military who alleges that a military officer has engaged in unconstitutional racial discrimination. And the doctrines of qualified and absolute immunity similarly demonstrate that the Constitution does not require an effective damages remedy for every constitutional violation.

The physical injury provision is constitutional under those precedents. While the physical injury provision bars an award of damages for mental or emotional injury absent a showing of physical injury, it leaves intact meaningful safeguards for the protection of inmates' constitutional rights. Most important, as all the circuits that have addressed the question have concluded, inmates who are subjected to violations of their constitutional rights may still obtain declaratory or injunctive relief. *Harper* v. *Showers*, 174 F.3d 716, 719 (5th Cir. 1999); *Perkins* v. *Kansas Dep't of Corr.*,

165 F.3d 803, 808 (10th Cir. 1999); *Davis* v. *District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998); *Zehner* v. *Trigg*, 133 F.3d 459, 461-463 (7th Cir. 1997). In addition, inmates subjected to constitutional violations may obtain (1) damages for physical injury; (2) damages for emotional and mental injury when they have also suffered a physical injury; and (3) damages for other injuries, such as economic injuries, that cannot be classified as emotional, mental, or physical.[4] As in *Bush* and *Schweiker*, there will be individual cases in which a particular plaintiff will not have an effective damages remedy. But as those cases and others establish, the Constitution does not require that there must be an effective damages remedy for every individual constitutional violation.

Moreover, Congress reasonably determined that permitting an award of damages for mental or emotional

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[4] When proof of a constitutional violation does not depend on proof of a mental or emotional injury, an inmate may also recover nominal damages and, in certain circumstances, punitive damages, absent a showing of physical injury. *Allah*, 226 F.3d at 251-252. Such an award of damages would be for the "constitutional violation," and not "for mental or emotional injury." *Ibid.* See also *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978) (nominal damages may be awarded under Section 1983 without proof of actual compensable injury); *Smith* v. *Wade*, 461 U.S. 30, 56 (1983) (punitive damages may be awarded under Section 1983 when defendant's conduct "is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others"). In this case, however, petitioners' Eighth Amendment claims depend on proof that they have suffered a mental or emotional injury. Any award of nominal or punitive damages would therefore be "for mental or emotional injury" within the meaning of Section 1997e(e). Accordingly, the physical injury provision bars an award of nominal or punitive damages in this case.

injuries without a showing of physical injury would impose substantial costs. In particular, Congress determined that inmates frequently file frivolous complaints and that many of those complaints are for alleged mental or emotional injuries. In response to that concern, Congress reasonably decided that inmates should not be permitted to file claims for mental or emotional injury absent a showing of physical injury. See *Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424, 429-430, 433 (1997) (noting common law tradition of restricting recovery for emotional harm to certain narrowly defined categories, including when it is accompanied by physical harm, and explaining that permitting claims for emotional harm outside those limited categories creates the potential for a flood of comparatively unimportant, or trivial claims).

The court of appeals in this case therefore correctly held that the physical injury provision is constitutional. The courts of appeals that have addressed the question have reached the same conclusion. *Davis* v. *District of Columbia*, 158 F.3d 1342, 1345-1348 (D.C. Cir. 1998); *Zehner* v. *Trigg*, 133 F.3d 459, 461-464 (7th Cir. 1997). Review of that question by this Court is not warranted.

CONCLUSION

With respect to the first question, the petition for a writ of certiorari should be held pending the decision in *Booth* v. *Churner* (No. 99-1964), and then disposed of as appropriate in light of that decision. With respect to the other three questions, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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